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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) 118/2019 & IA No.2953/2019 (u/O XXXIX R-1&2 CPC)**

PRABHA SHARMA & ORS.

..... Plaintiffs

Through: **Mr. S.K. Nanda and Mr. Lavkesh
Bhambhani, Advs.**

Versus

RUKMANI SHARMA & ORS.

..... Defendants

Through: **Mr. Inasi Haider, Adv. for D-1 to 3.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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17.01.2020

1. The three plaintiffs, namely (i) Prabha Sharma, (ii) Ashok Kumar Sharma and (iii) Pratibha Sharma, being the two daughters and son of Kali Charan Sharma, have instituted this suit against the widow, daughter and son namely (a) Rukamani Sharma, (b) Swati Sharma and (c) Siddharth Sharma, of Arun Kumar Sharma, a predeceased son of Kali Charan Sharma, for partition of property No.B-7/76, Safdarjung Enclave (Main), New Delhi constructed over land ad-measuring 119.8 sq. mtrs. and comprising of ground floor, first floor and half constructed second floor and for ancillary reliefs.
2. The suit was entertained and summons thereof ordered to be issued.
3. The defendants have filed a joint written statement to which a replication has been filed by the plaintiffs.
4. The suit is ripe for framing of issues.

5. The counsels have been heard and the file perused.
6. It is the claim of the plaintiffs (i) that the property aforesaid belonged to Kali Charan Sharma; (ii) that Kali Charan Sharma died in 2017, leaving a Will dated 16th February, 2017 whereunder the three plaintiff are entitled to 1/4th share each therein and the three defendants together are entitled to the remaining 1/4th share in the sale proceeds of the said property; (iii) that the Will also provided that if the property is not sold within three months of the demise of Kali Charan Sharma, plaintiff No.2 Ashok Kumar Sharma will enjoy the first floor of the property; the defendants would enjoy the front portion of the ground floor of the property, the plaintiff No.1 Prabha Sharma would enjoy the rear portion of the ground floor of the property and the plaintiff No.3 Pratibha Sharma shall enjoy the second floor of the property, till the property is sold; (iv) that the defendants in their written statement have denied the Will aforesaid of Kali Charan Sharma; and, (v) that the defendants however prior to institution of this suit, had filed a suit for permanent injunction against the plaintiffs and in the plaint in which suit, the defendants had admitted the Will aforesaid.
7. The counsel for the defendants states that in the plaint in the earlier suit, only a mention was made of the Will, but the defendants had not seen the Will.
8. The counsel for the defendants however states that the defendants are agreeable to sell the property and to receiving 1/4th undivided share in the sale proceeds.
9. The counsel for the plaintiffs states that owing to the prevalent low prices of real estate, if the property were to be sold today, good price would not
- CS(OS) 118/2019*

be realised and the plaintiffs desire that the defendants, who are in exclusive possession of the ground floor of the property, should hand over possession of the rear portion of the ground floor to plaintiff No.1 Prabha Sharma and also compensate the plaintiff No.1 for occupation thereof.

10. However, the plaintiffs have not sued for recovery of possession or for recovery of the amount payable by way of compensation, stated to be specified in the Will, and have merely sued for *mesne* profits computed at the amounts specified.

11. The plaintiffs, if desired to recover possession of rear portion of ground floor and *mesne profits* therefor, were required to claim recovery of possession and of the amount due till the date of institution of the suit on 16th January, 2019 re-field on 5th February, 15th February, 20th February and 23rd February, 2019 and which the plaintiffs have not done.

12. The counsel for the defendants states that the defendants are agreeable for sale of the property.

13. There being no dispute between the parties as to shares and with respect to the Will, providing for sale of the property, there is no need for the matter to be put to trial.

14. Accordingly, a preliminary decree for partition of property No.B-7/76, Safdarjung Enclave Main, New Delhi is passed, declaring the plaintiff No.1 Prabha Sharma to be having 1/4th undivided share therein, plaintiff No.2 Ashok Kumar Sharma to be having 1/4th undivided share therein, plaintiff No.3 Pratibha Sharma to be having 1/4th undivided share therein

and the defendants No.1 to 3 namely (a) Rukamani Sharma, (b) Swati Sharma and (c) Siddharth Sharma to be together having the remaining 1/4th undivided share therein.

15. Preliminary decree for partition be drawn up.

16. The plaintiffs having relied upon the Will which provides for sale of the property, a final decree for partition of property No.B-7/76, Safdarjung Enclave Main, New Delhi is also passed, of sale thereof and of distribution of sale proceeds amongst the parties as per shares declared in the preliminary decree for partition.

17. Final decree for partition be drawn up.

18. The court fees on the final decree for partition to be borne by the parties in proportion of their share in the preliminary decree for partition.

19. Though the suit, as filed, was misconceived but with the intent not to harm the plaintiffs as litigants, a certificate is ordered to be issued, of refund of court fees paid of Rs.91,600/- less Rs.25,000/-. The certificate be handed over to the counsel for the plaintiffs.

20. The defendants have not paid costs imposed on 21st November, 2019 and the counsel for the defendants is refusing to pay the costs.

21. The defendants shall not be entitled to their share of sale proceeds till pay the costs.

RAJIV SAHAI ENDLAW, J.

JANUARY 17, 2020

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